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SUPREME COURT, U. S.

No. 1209

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN L. BROWN AND CLEVELAND JOHNS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet App. 8–12) has not yet been reported.

JURISDICTION

The judgments of the court of appeals were entered on December 23, 1969 (Pet. App. 13–14). On January 26, 1970 (pursuant to a telegraphic request received by the Clerk on January 21), Mr. Justice Black extended the time for filing a petition for a writ of certiorari until February 21, 1970 (Pet. App. 15–16), and the petition was filed on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were denied due process in consequence of the circumstances attending their arraignment.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of possessing property intended for use in the production of nontaxpaid liquor, in violation of 26 U.S.C. 5686(a) (R. 1–2, 101). On January 29, 1969, petitioner Brown was sentenced to six months' and petitioner Johns to twelve months' imprisonment (R. 101–105). The court of appeals affirmed.

1. In late 1967 petitioner Johns arranged with a grocer in Marshallville, Georgia, to buy large amounts of sugar, wheat bran, and yeast. The arrangement contemplated that Johns would pick up and pay for the goods at the grocer's house in the early hours of the morning. Early on January 30, 1968, Johns drove past the grocer's house in a Ford automobile, returned to the house, loaded a box into the car, drove away, and returned again. He got out of the car, flashed a light around the area, and again drove away. Shortly thereafter Johns met petitioner Brown and one Glass (a codefendant who pleaded guilty) and the three drove to the house in the Ford and a Chrysler. After loading additional materials into the two automobiles, Glass left in one car and petitioners left in the other. An officer who had been watching the premises radioed other investigators when the men drove off. One group of officers stopped Glass and arrested him

when he attempted to flee. Other investigators arrested petitioners when their car, following a chase, ran into a tree. After Johns had been advised of his rights, he again attempted to escape and later denied that he knew Glass or that he had picked up supplies in Marshallville. Johns had a piece of paper in his billfold on which the name "Ed" and a telephone number were written. The number was that of one Ed Walters, a known liquor violator. The two automobiles, each of which was equipped with heavy duty overload springs, contained 79 bales of sugar, 400 pounds of wheat bran, and 46 pounds of yeast (Pet. App. 9–10; R. 12–13).

2. Petitioners, neither of whom had as yet retained counsel, appeared for arraignment in Americus, Georgia, at 10 a.m. on January 13, 1969. Neither petitioner was a resident of that city and neither, although the indictment had been returned five months previously (see R. 1), had as yet been furnished with a copy.[1] Upon learning that petitioners had not previously seen the indictment and upon being advised that it was their intention to engage an attorney but that they had

[1] It had been the practice of the government in this judicial district to mail copies of indictments in advance of the dates set for arraignments to the attorneys of defendants whom the government knew to be represented, but not similarly to provide unrepresented defendants, in advance of their scheduled arraignments, with copies of the true bills naming them as accused. The court, which learned in this proceeding that defendants who had not retained counsel were not being furnished with the indictments pertaining to them prior to their scheduled arraignment dates, directed the government to correct this aspect of its practice in the future (Pet. App. 20–22).

deferred doing so until they had seen what the charge was, the court continued the proceedings to give them the opportunity to hire and consult with a lawyer.[2] The court noted during the colloquy that it would take the court another 45 minutes or an hour to complete the morning's calendar call; that petitioners should try to find and advise with a lawyer while the court was attending to its other pending business; and that after it had completed the other business the court would see whether petitioners were in a position to enter their pleas. In response to a suggestion by one of the petitioners that the court refer them to a good local lawyer, the court advised that he never did that, noted that there were a number of lawyers present in the courtroom and that there were others in the city who were not in court, and said that it was up to petitioners to select any lawyer they wished. At 11:50 a.m., approximately an hour and three quarters later, the court, having finished its other business, returned to petitioners' case and was advised that during the interval petitioners had retained William E. Smith, a local lawyer, to represent them and that with the assistance of Mr. Smith they had entered pleas of not guilty (evidently before another judge) (Pet. App. 17–23).

Still represented by Mr. Smith, who so far as appears made no request for a continuance or otherwise indicated that he needed or desired more time in which to prepare for trial, petitioners were tried in a single-

[2] Petitioners had informed the court that it was their desire and intention to retain one attorney to represent them both (Pet. App. 19–20, 22).

day trial two weeks later (R. 3, 114). Attorney Smith also represented petitioners on appeal (R. 117).[3]

ARGUMENT

Petitioners' only contention is that they were denied due process by the totality of the circumstances in which they were called on to plead to the indictment. Having been summoned to appear for arraignment without previously having been served with copies of the indictment, in a locale with which they were unfamiliar, and at a time when they had not yet retained counsel, they say, they were required to employ counsel on too short notice, and too speedily to enter their pleas. The claim, which was presented to neither court below,[4] is insubstantial.

The district court made it adequately clear to petitioners that they were free to employ any attorney they chose; that they would not be required to plead to the indictment until after they had engaged and had had an opportunity to advise with counsel; and that they would be called on to enter their pleas that morning only if they were in a position to do so after those necessary preliminaries had been accomplished.

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[3] Petitioners' present attorney was first retained in connection with the proceedings in this Court.

[4] As petitioners point out (Pet. 4), the portion of the record relied on—the arraignment proceedings of January 13 (Pet. App. 17–23)—was not even transcribed until after the court of appeals' judgment (see Pet. App. 23). Nor did petitioners seek rehearing below on the basis of the matters now urged. Thus, as petitioners acknowledge, the arraignment proceedings were not before and were not considered by the court of appeals (Pet. 4). This consideration alone, we suggest, warrants refusal by this Court to review the matters here sought to be raised.

Moreover, since the pleas entered were denials of guilt, it is in any event not apparent how petitioners could possibly have been prejudiced. If there be an implication that petitioners might have selected a different lawyer if it had been more clearly brought home to them that they were not bound to choose one that morning, and that the hypothetical attorney might have represented them more effectively *at the trial* than the lawyer whom they retained, it is sufficient to note that there is no indication in the record that either petitioner felt he had had inadequate time to secure counsel. Neither is there any indication—nor do petitioners, indeed, suggest—that either was dissatisfied with their chosen attorney's services, including the representation afforded them at the trial. That petitioners were not dissatisfied with the attorney's performance is indicated by the fact that they continued his retainer on appeal.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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Attorney.

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